Theow Say Kow @ Teoh Kiang Seng, Henry & Anor v Teoh Kiang Hong & Ors and another suit

HIGH COURT (PULAU PINANG) — CIVIL SUIT NOS 22NCVC-83–02 OF 2013 & 22NCVC-80–02 OF 2013
S NANTHA BALAN JC
21 OCTOBER 2013

Companies and Corporations — Winding up — Disposition of property — Whether transfers of shares in companies between individuals after commencement of winding up avoided by s 223 Companies Act 1965 ('Act') — Whether s 223 of the Act envisaged freeze on shareholding and status of members of company after commencement of winding up unless sanctioned by winding up court — — Whether Nadaraja a/l Muthu & Ors v Palanisamy a/l Ramasamy wrongly decided — Whether phrases 'any disposition of property of company' and 'any transfer of shares or alteration in status of members of company' in s 223 should be read disjunctively — Whether common law stay of windingup obtained from civil court could not render s 223 inoperable unlike stay obtained under s 243 of the Act — Whether court should determine question of law or construction under O 14A of the Rules of Court 2012 even though determination would not conclude action but only dispose of significant aspect of case

The main issue that arose for determination in the consolidated suits herein was whether the transfers of shares ('the impugned share transfers') in three companies between certain individuals after winding up had been commenced against those companies was void under s 223 of the Companies Act 1965 ('Act') which states: 'Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of winding up by the court shall, unless the court otherwise orders, be void.'The party contending that the impugned share transfers were valid said the shares in question were not the property of the companies and relied upon the decision of the High Court in *Nadaraja a/l Muthu & Ors v Palanisamy a/l Ramasamy* [2003] 2 MLJ 523 (*'Nadaraja's* case') which held that the phrases 'any disposition of the property of the company' and 'any transfer of shares or alteration in the status of the members of the company' in s 223 of the Act should be read conjunctively and that a transfer of shares which did not entail or involve disposition of the company's property did not come within the purview of s 223. The ratio in *Nadaraja*'s case was followed in three subsequent High Court cases. The party contending that the impugned share transfers were void contended that *Nadaraja*'s case was wrongly decided after considering cases concerning dispositions of property belonging to a company whereas the subject matter before the court in that case concerned shares owned by an

individual. It was further argued that *Nadaraja*'s case failed to consider any of the several cases that existed in various other jurisdictions having provisions equivalent to s 223 of the Act, all holding that the aforesaid two phrases in s 223 of the Act should be read disjunctively and that a transfer of shares owned by individuals in a company after commencement of winding up was void vis-a-vis the company. Another issue that surfaced was whether a common law stay obtained from a civil court to stay the winding up petitions against the three companies had the same effect as a stay of the winding up obtained under s 243 of the Act so as to render s 223 of the Act inoperative and obviate the need to have a winding up court validate the impugned share transfers. Although both the consolidated suits raised several other issues and sought for a host of reliefs, the first and second defendants in Suit No 22NCVC-83–02 of 2013 respectively filed applications under O 14A of the Rules of Court 2012 ('the applications') seeking the court's determination on whether the impugned share transfers were valid.

Held, allowing the applications:

(1) The impugned share transfers having taken place after the commencement of the winding up of the companies, and in the absence of any validation order granted by the winding up court, were contrary to s 223 of the Act and were void (see paras 81 & 84).

(2) The words 'any transfer of shares' in s 223 of the Act related to changes in the ownership of shares in a company. It was separate and distinctly different from assets or property of the company. The phrase 'any disposition of the property of the company' in that section encompassed shares owned by the company, meaning assets or property of the company. Hence, 'any transfer of shares' or change in ownership of shares post commencement of winding up catered for a situation separate from 'any disposition of the property of the company'and those two phrases in s 223 of the Act must be read disjunctively. Section 223 of the Act envisaged a moratorium on shareholding and status of members of the company post commencement of winding up unless there was a validation order by the winding up court permitting any change to shareholding or status of members (see paras 89–90).

(3) *Nadaraja*'s case to the extent it enunciated that transfers of shares post commencement of winding up were not caught by s 223 of the Act was decided per incuriam. That case did not even concern a transfer of shares of a company in respect of which winding up proceedings had actually been commenced. Also, no authorities were tendered by the defendant in that case to support the argument that the transfer of an individual's shares was contrary to s 223 of the Act. There were, in fact, a plethora of cases on the point and decided cases in the United Kingdom, Singapore and Australian jurisdictions clearly established that any transfer of shares

after commencement of winding up was void vis-a-vis the company although valid inter se between the parties to the transaction (see paras 45, 79 & 82).

(4) Since the common law stay order obtained from the civil court was not a stay under s 243 of the Act, a validation order under s 223 of the Act was necessary to validate the impugned share transfers. As there was no validation order, the impugned share transfers were void. The decision of the Court of Appeal in *Bintang-Bintang Sdn Bhd v The Ayer Molek Rubber Co Bhd* [2013] 4 MLJ 401 clearly and unequivocally stated that a stay under s 243 of the Act obviated the need for a validation order under s 223 of the Act. Since the stay obtained in the present case was not such a stay, the *Ayer Molek*'s case could not apply to the facts of the present case (see paras 116–117).

(5) The real question for the court in an O 14A application was whether the court could dispose of the case or a major part of the case or the most significant issue in the case. From the words of O 14A and the decision of the Court of Appeal in *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu* [2004] 1 MLJ 8 it was clear that for the court to exercise its powers under O 14A, the whole case did not have to be disposed of; it was sufficient if substantial matters could be disposed of. Where the question for determination was a dominant feature of the case, the court ought to proceed to determine the question under O 14A. Although there was a factual dispute in the present suits regarding the ownership of some of the shares, that dispute did not affect, and was not relevant to, the applications. Although the applications did not in themselves conclude both the suits, the resolution of both applications determined a significant, if not the most significant, aspect of both actions (see paras 27, 32–33).

[Bahasa Malaysia summary

Isu utama untuk ditentukan dalam guaman-guaman yang disatukan adalah sama ada pemindahan saham ('pemindahan saham yang dipersoalkan') dalam tiga syarikat antara individu-individu tertentu selepas penggulungan dimulakan terhadap syarikat-syarikat tersebut adalah tidak sah di bawah s 223 Akta Syarikat 1965 ('Akta') yang menyatakan: 'Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of winding up by the court shall, unless the court otherwise orders, be void.' Pihak yang menegaskan bahawa pemindahan saham yang dipersoalkan itu adalah sah menyatkan saham yang dipersoalkan itu bukan harta syarikat-syarikat tersebut dan bergantung kepada keputusan Mahkamah Tinggi dalam kes *Nadaraja a/l Muthu & Ors v Palanisamy a/l Ramasamy* [2003] 2 MLJ 523 ('kes *Nadaraja*') yang memutuskan bahawa ungkapan 'any disposition of the property of the company' dan 'any transfer of shares or

alteration in the status of the members of the company' dalam s 223 Akta tersebut patut dibaca bersama dan bahawa pemindahan saham yang tidak memerlukan atau melibatkan pelupusan harta syarikat tidak jatuh di bawah skop s 223. Ratio dalam kes *Nadaraja* telah diikut dalam tiga kes Mahkamah Tinggi. Pihak yang menegaskan bahawa pemindahan saham yang dipersoalkan itu adalah tidak sah berhujah bahawa keputusan kes *Nadaraja* adalah salah setelah mempertimbangkan kes-kes berkaitan pelupusan harta yang dimiliki suatu syarikat manakala hal perkara di hadapan mahkamah dalam kes tersebut adalah berkaitan saham-saham milik individu. Selanjutnya adalah dihujahkan bahawa kes *Nadaraja* telah gagal mengambil kira mana-mana kes yang terdapat dalam pelbagai bidang kuasa yang mempunyai peruntukan sama dengan s 223 Akta tersebut, yang mana semuanya memutuskan bahawa dua ungkapan dalam s 223 Akta tersebut patut dibaca secara berasingan dan bahawa pemindahan saham milik individu dalam syarikat selepas penggulungan bermula adalah tidak sah ke atas syarikat itu. Satu lagi isu yang timbul adalah sama ada penggantungan di bawah *common law* daripada mahkamah sivil untuk menggantung petisyen penggulungan terhadap tiga syarikat tersebut mempunyai kesan sama seperti penggantungan penggulungan yang diperolehi di bawah s 243 tersebut untuk menyebabkan s 223 tersebut menjadi tidak berkuat kuasa dan menyingkirkan keperluan untuk mahkamah penggulungan mengesahkan pemindahan saham yang dipersoalkan tersebut. Walaupun kedua-dua guaman yang disatukan ini menimbulkan beberapa isu lain dan memohon pelbagai relief, defendan-defendan pertama dan kedua dalam Guaman No 22NCVC-83-02 Tahun 2013 masing-masing telah memfailkan permohonan-permohonan di bawah A 14A Kaedah-Kaedah Mahkamah 2012 ('permohonan-permohonan tersebut') dengan memohon untuk penentuan mahkamah berhubung sama ada pemindahan saham yang dipersoalkan itu adalah sah.

Diputuskan, membenarkan permohonan-permohonan:

(1) Pemindahan saham yang dipersoalkan telah berlaku selepas penggulungan syarikat-syarikat tersebut dimulakan, dan dalam ketiadaan apa-apa perintah pengesahan yang diberikan oleh mahkamah penggulungan, adalah bertentangan dengan s 223 Akta tersebut dan tidak sah (lihat perenggan 81–84).

(2) Perkataan-perkataan 'any transfer of shares' dalam s 223 Akta tersebut berkaitan perubahan dalam pemilikan saham dalam syarikat. Ia berasingan dan berbeza daripada aset-aset atau harta syarikat. Ungkapan 'any disposition of the property of the company' dalam seksyen itu merangkumi saham yang dimiliki oleh syarikat itu, bermaksud aset-aset atau harta syarikat. Justeru, 'any transfer of shares' atau perubahan dalam pemilikan saham selepas bermula penggulungan yang dibuat bagi suatu keadaan yang berasingan daripada 'any disposition of the property of the company' dan dua ungkapan tersebut dalam s 223 Akta tersebut

hendaklah dibaca secara berasingan. Seksyen 223 Akta tersebut menjangkakan suatu moratorium dalam pegangan saham dan status ahli-ahli syarikat itu selepas penggulungan dimulakan kecuali terdapat perintah pengesahan oleh mahkamah penggulungan yang membenarkan apa-apa perubahan kepada pegangan saham atau status ahli-ahli (lihat perenggan 89–90).

(3) Kes *Nadaraja* sampai ke satu tahap yang mana ia menyatakan bahawa pemindahan saham selepas penggulungan bermula tidak terikat oleh s 223 Akta tersebut telah diputuskan per incuriam. Kes tersebut tidak langsung berkaitan pemindahan saham syarikat di mana prosiding penggulungan telah pun dimulakan. Juga, tiada autoriti yang ditenderkan oleh defendan dalam kes tersebut bagi menyokong hujah bahawa pemindahan saham individu itu adalah bertentangan dengan s 223 Akta tersebut. Bahkan terdapat pelbagai kes berkaitan dan kes-kes yang telah diputuskan dalam bidang kuasa United Kingdom, Singapura dan Australia yang jelas membuktikan bahawa apa-apa pemindahan saham selepas penggulungan dimulakan adalah tidak sah melalui syarikat meskipun sah inter se antara pihak-pihak kepada transaksi itu (lihat perenggan 45, 79 & 82).

(4) Oleh kerana perintah penggantungan di bawah *common law* telah diperoleh daripada mahkamah sivil bukan penggantungan di bawah s 243 Akta tersebut, perintah pengesahan di bawah s 223 Akta tersebut adalah perlu untuk mengesahkan pemindahan saham yang dipersoalkan. Oleh kerana tiada perintah pengesahan, maka pemindahan saham yang dipersoalkan adalah tidak sah. Keputusan Mahkamah Rayuan dalam kes *Bintang-Bintang Sdn Bhd v The Ayer Molek Rubber Co Bhd* [2013] 4 MLJ 401 dengan jelas dan dengan tegas menyatakan bahawa suatu penggantungan di bawah s 243 Akta tersebut menyingkirkan keperluan untuk perintah pengesahan di bawah s 223 Akta tersebut. Oleh kerana penggantungan itu diperoleh dalam kes ini bukan penggantungan sedemikian, kes *Ayer Molek* tidak boleh terpakai kepada fakta kes ini (lihat perenggan 116–117).

(5) Persoalan sebenar untuk mahkamah dalam permohonan A 14A adalah sama ada mahkamah boleh melupuskan kes itu atau sebahagian besar kes itu atau isu paling ketara dalam kes itu. Berdasarkan perkataan-perkataan dalam A 14A dan keputusan Mahkamah Rayuan dalam *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu* [2004] 1 MLJ 8 adalah jelas bahawa untuk mahkamah menggunakan kuasanya di bawah A 14A, keseluruhan kes tidak perlu dilupuskan; ia adalah mencukupi jika perkara-perkara penting boleh dilupuskan. Di mana persoalan untuk penentuan adalah ciri-ciri dominan kes itu, mahkamah patut meneruskan untuk memutuskan persoalan itu di bawah A 14A. Walaupun terdapat pertikaian fakta dalam guaman-guaman ini berkaitan

pemilikan beberapa saham, pertikaian tersebut tidak menjejaskan, dan tidak relevan kepada, permohonan-permohonan itu. Walaupun permohonan-permohonan itu dengan sendiri tidak memuktamadkan kedua-dua guaman, resolusi kedua-dua permohonan itu menentukan aspek penting, jika tidak paling penting, untuk kedua-dua tindakan (lihat perenggan 27, 32–33).]

Notes

For cases on disposition of property, see 3(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1235–1250.

Cases referred to

A I Levy (Holdings) Ltd, Re [1964] 1 Ch 19, Ch D (refd)

BIMB Musyarakah Satu Sdn Bhd v Lee Kik Hooi & Ors [2009] 8 MLJ 711; [2009] 8 CLJ 529, HC (refd)

Bintang-Bintang Sdn Bhd v The Ayer Molek Rubber Co Bhd [2013] 4 MLJ 401; [2013] 4 CLJ 820, CA (not folld)

Carringbush Corporation Pty Ltd v Australian Securities And Investments Commission [2008] FCA 474, FC (refd)

Foong Thian Fook v Official Receiver and liquidator of Thow Hai Guan Sdn Bhd and third party [1996] MLJU 243, HC (refd)

Hendricks International Hotels & Resorts Pte Ltd v YTL Hotels & Properties Sdn Bhd & Ors [2003] 3 MLJ 742; [2003] 4 AMR 359, CA (refd)

Huddersfield Police Authority v Watson [1947] KB 842 (refd)

In Re London, Hamburg, and Continental Exchange Bank; Emmerson's case (1866) LR 2 Eq 231 (refd)

Jordanlane Pty Ltd v Kitching [2008] VSC 426, SC (refd)

Kimoyama Elektrik (M) Sdn Bhd v Metrobilt Construction Sdn Bhd [1990] 3 MLJ 309; [1990] 2 CLJ (Rep) 253, HC (refd)

Klaus Maertin Pty Ltd (in liq); Maertin v Klaus Maertin Pty Ltd [2009] NSWSC 618, SC (refd)

Kok Fook Sang v Juta Villa (M) Sdn Bhd & Ors [1996] 2 MLJ 666, CA (refd)

Kong Swee Eng v Rolles Rudolf Jurgen August [2011] 1 SLR 873, HC (refd)

Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 2 MLJ 449; [1988] 1 LNS 44, SC (refd)

Lim Chiew v Siteman Construction Sdn Bhd v Khairul Anuar bin Mamat Kuala Lumpur High Court Companies Winding Up No D-28NCC-186–2010 (unreported) (refd)

Lina Soo v Ngu Chu Hiong & Anor [2003] 6 MLJ 641, HC (refd)

London, Hamburg and Continental Exchange Bank, Re Emmerson's Case (1866) LR 1 Ch App 433 (refd)

Nadaraja a/l Muthu & Ors v Palanisamy a/l Ramasamy [2003] 2 MLJ 523; [2003] 8 CLJ 403, HC (not folld)

Noh Hyoung Seok v Perwira Affin Bank Bhd [2004] 2 MLJ 203, CA (refd)

Onward Building Society, Re [1891] 2 QB 463, CA (refd)

Perbadanan Nasional Berhad v Dato' Ibrahim bin Ali [2012] MLJU 925; [2012] 1 LNS 585, HC (refd)
Petroleum Nasional Bhd v Kerajaan Negeri Terengganu [2004] 1 MLJ 8, CA (refd)
Rofa Sport Management AG v DHL International (UK) LTD [1989] 1 WLR 902, CA (refd)
Sullivan v Henderson [1973] 1 All ER 48 (refd)
Sundralingam v Ramanathan Chettiar [1967] 2 MLJ 211, FC (refd)
Wiltshire Iron Co ex parte Pearson, Re (1868) 3 Ch App 443 (refd)
Zulpadli & Edham v Inai Offshore & Marine Engineering Sdn Bhd (in liquidation) [2011] 4 MLJ 161; [2012] 2 AMR 95, CA (folld)

Legislation referred to

Companies Act 1965 ss 145(1), 218(1)(f), (i), 219, 223, 243
Companies Act (Cap 50, 2006 Rev Ed) [SG] s 259
Companies Act 1862 [UK] s 153
Companies Act 1948 [UK] ss 181, 227
Corporations Act 2001 [AU] ss 468, 468(1), 468A, 468A(1)
Courts of Judicature Act 1964 s 73
Insolvency Act 1986 [UK] s 127
Rules of Court 2012 O 14A, O 14A r 1

Bastian Vendargon (Gene Vendargon and Goik Kenwayne with him) (Dennis Nik & Wong) for the first and the second plaintiffs.
Gregory Ling (Ranjit Singh & Yeoh) for the first defendant.
M Thayalan (Thayalan & Associates) for the second defendant.
Rizal Jafry bin Isa (Companies Commissioner of Malaysia) for the sixth defendant.

S Nantha Balan JC:

INTRODUCTION

[1] The issues that arise in this case are as follows:

(a) whether a transfer of shares in a company after commencement of winding up (as defined in s 219(2) of the Companies Act 1965, that is, upon the presentation of a winding up petition in respect of that company), falls within the ambit of s 223 of the Companies Act 1965 ('s 223 CA') such that vis-a-vis the company, the transfer is void, unless validated by the court. The other aspect of this issue is also whether the case of *Nadaraja a/l Muthu & Ors v Palanisamy a/l Ramasamy* [2003] 2 MLJ 523; [2003] 8 CLJ 403 was decided perincuriam ('the first issue'); and

(b) whether a common law stay (as opposed to a stay made under s 243 of the Companies Act 1965 — (s 243 CA) of the winding up proceedings made

by a court in related civil proceedings has the effect of rendering s 223 CA inoperative so long as the stay is extant. The other aspect of this issue is also whether the decision of the Court of Appeal in *Bintang-Bintang Sdn Bhd v The Ayer Molek Rubber Company Bhd* [2013] 4 MLJ 401; [2013] 4 CLJ 820 which was predicated on the stay of a winding up under s 243 CA and therefore rendering s 223 CA inoperative, equally applies to a common law stay of winding up proceedings ('the second issue').

[2] The first issue lies at the heart of two applications made under O 14A of the Rules of Court 2012 ('ROC 2012') namely the notice of application dated 17 July 2013 by Tan Sai Hong ('Madam Tan'), the plaintiff in Penang High Court Civil Suit No 22NCVC-80–02 of 2013 ('Suit No 80') which shall be referred to as 'Madam Tan's O 14A application'(encl 33) and notice of application dated 29 July 2013 filed by Teoh Kiang Hong ('Gary'), the second defendant in Penang High Court Civil Suit No 22NCVC-83–02 of 2013 ('Suit No 83') which shall be referred to as 'Gary's O 14A application' (encl 36). Madam Tan's O 14A application and Gary's O 14A application shall collectively be called 'the O 14A applications'. The Companies Act 1965 will hereafter be referred to as 'CA'.

[3] As is apparent from the intitule, these are consolidated proceedings whereby Suit No 80 and Suit No 83 were consolidated by an order dated 21 June 2013. As the parties have been described differently in the two suits, there is bound to be confusion if I were to refer to the parties either as the plaintiff or the defendant. As such and in order to avoid confusion, I have decided to adopt the following nomenclature in describing the parties:

Nomenclature	
Theow Say Kow @ Teoh Kiang Seng, Henry: the first plaintiff in Suit No 83 and the defendant in Suit No 80	Henry
Teoh Soo Beng: the second plaintiff in Suit No 83	Todt
Teoh Kiang Hong: the first defendant in Suit No 83	Gary
Tan Sai Hong: the second defendant in Suit No 83 and the plaintiff in Suit No 80	Madam Tan
Juru Auto-City Sdn Bhd (No Syarikat 137490-H) (dahulu yang dikenali sebagai Frontier Highway Auto City Sdn Bhd dan Tefatta Industry Sdn Bhd): the third defendant in Suit No 83	JACSB
Highway Landmark Sdn Bhd (No Syarikat 344772-X): the fourth defendant in Suit No 83	HLSB

Western Frontier Sdn Bhd (No Syarikat 313190-Dd): the fifth defendant in Suit No 83	WFSB
Suruhanjaya Syarikat Malaysia: the sixth defendant in Suit No 83	SSM
JACSB, HLSB and WFSB	the companies

THE BACKGROUND

The relationship of the parties

[4] Henry and Gary are brothers. Madam Tan is Henry and Gary's mother. Todt is Henry and Gary's cousin. JACSB, HLSB and WFSB are private limited companies ('the companies') that were originally used to purchase four lots of lands known as Lots 575, 576, 582 and 650, located in Juru, Penang ('the lands') which later became known as the Autocity Development, Phases 1 and 2 ('Autocity 1 & 2');

Shareholding structure in the companies

[5] Prior to the impugned share transfers which are under challenge in the O 14A applications, the shareholding structure of the companies was as follows:

JACSB		
Madam Tan	1,078,000 shares	42.5%
Gary	804,501 shares	31.7%
Henry	654,501 shares	25.8%

HLSB		
Madam Tan	1,078,000 shares	42.5%
Gary	804,450 shares	31.7%
Henry	65,450 shares	25.8%

WFSB		
JACSB	300,000 shares	99.999%
Gary	1 share	0.00035%
Madam Tan	1 share	0.00035%

The on-going litigation

[6] Prior to the filing of Suit No 83, Henry filed several civil suits in the Penang High Court, including Penang High Court Civil Suit No 22–58 of 2008 filed on 1 February 2008 against Gary and others ('first suit') and Penang High Court Civil Suit No 22–52 of 2010 also against Gary and others ('main suit'). Madam Tan was a co-plaintiff in the main suit and supported Henry in the litigation against Gary.

[7] On 5 March 2008, Gary filed a civil suit against Henry via Penang High Court Civil Suit No 22–121 of 2008 seeking specific performance of a share sale agreement dated 28 January 2005 entered between Gary and Henry wherein Henry had allegedly agreed to sell to Gary all of his shares in the companies but despite payment, Henry refused to transfer ownership and the shares remained registered in Henry's name ('the SP Suit'). The main suit is being heard together with the SP suit and has proceeded to trial since 2012 and is presently part heard before His Lordship Justice Dato' Seri Zakaria bin Sam JCA.

Winding up petitions

[8] Gary commenced winding-up proceedings against the companies pursuant to s 218(1)(f) and (i) of the CA, the details of which are as follows:

(a) Penang High Court Winding Up Petition No 28–8 of 2010 which was presented on 20 January 2010 in relation to JACSB ('JACSB petition');

(b) Penang High Court Winding Up Petition No 28–11 of 2010 which was presented on 25 January 2010 in relation to HLSB ('HLSB petition'); and

(c) Penang High Court Winding Up Petition No 28–9 of 2010 which was presented on 20 January 2010 in relation to WFSB ('WFSB petition').

(d) The JACSB petition, HLSB petition and the WFSB petition shall collectively be called as 'the winding up petitions'.

Stay order

[9] On 2 November 2010, in the main suit, an order was made which, inter alia, injuncted Gary from continuing with any proceedings in the winding up petitions and stayed the proceedings (*sine die*) under the winding up petitions ('the stay order'). The stay order reads as follows:

1. Suatu injunksi interlokutori bagi menghalang dan/atau menahan defendan

ketiga atau mana-mana pihak, ejen-ejen dan/atau pekerjanya daripada meneruskan dengan apa-apa prosiding berhubung dengan apa-apa petisyen penggulungan terhadap plaintif pertama, plaintif kedua dan/atau plaintif ketiga atau mana-mana plaintif atau mana-mana pihak termasuk petisyen penggulungaan No 28–8–2010 terhadap plaintif pertama, petisyen penggulungan No 22 September 2010 (sic) terhadap plaintif Ke-2 dan/atau petisyen penggulungan No 22–11–2010 (sic) terhadap JURU AUTOCITY SDN BHD (137490-H), WESTERN FRONTIER SDN BHD (313190-D), HIGHWAY LANDMARK SDN BHD (344772-X), TAN SAI HONG, TEOH AH BAH @ TEOW WENG HAK, THEOW SAY KOW @ TEOH KIANG SENG, TEOH KAI CHEAK dan TEOH SOO BENG semasa menunggu muktamad guaman sivil di sini dan/atau guaman sivil No 22–58–2008 dan/atau 22–616–2009 dan/atau;

2. Suatu perintah bahawa defendan ketiga mematuhi perintah (x) dalam perintah ex-parte Mahkamah Tinggi bertarikh 29 Januari 2010 yang menghalang defendan-defendan daripada melakukan apa-apa tindakan-tindakan yang boleh mencampur-tangan dengan hak dan/atau ekuiti plaintif-plaintif pertama sehingga plaintif ketiga bersangkut-paut hartanah-hartanah milikan plaintif-plaintif pertama sehingga plaintif ketiga semasa menunggu bicara penuh muktamad guaman sivil disini;

3. Suatu perintah bahawa defendan ketiga atau mana-mana pihak bersangkut-paut defendan ketiga ditahan daripada mengecewakan tuntutan-tuntutan plaintif-plaintif di sini dengan menfailkan atau meneruskan dengan apa-apa petisyen-petisyen penggulungan terhadap plaintif pertama sehingga the plaintiff ketiga atau mana-mana pihak yang bersangkut-paut dengan plaintif pertama sehingga plaintif ketiga semasa menunggu bicara muktamad dan/atau guaman sivil No 22–52–2010 dan/atau guaman sivil No 22–616–2009 dan/atau guaman sivil No 22–58–2008;

4. Suatu perintah bahawa apa-apa petisven penggulungan terhadap plaintif pertama sehingga plaintif kelima digantungkan sinie die semasa menunggu bicara muktamad guaman sivil di sini dan/atau guaman sivil No 22–616–2009 dan/atau guaman sivil No 22–58–2008.

Developments in the main suit

[10] Thereafter, important developments took place in the main suit. Madam Tan had apparently switched allegiance and no longer backed Henry. Madam Tan turned against Henry and instead decided to support Gary. As far as Henry was concerned, this was a seismic shift in Madam Tan's allegiance and had serious implications to him at various levels. But I will say no more about these matters as they are irrelevant to the determination of the O 14A applications. For present purposes, what is important is the event which occurred on or around 22 November 2012 when all of Madam Tan's said shares

in the companies were transferred to Henry and the same was registered in the records of the companies. Apparently this was done without any notice to Madam Tan.

[11] Then, at the continued trial date of the main suit on 7 January 2013, Madam Tan was recalled to testify wherein she stated on oath that she has been cheated by Henry and his former lawyers and her police report dated 26 December 2012 was tendered to the court. So, for all intents and purposes, from initially being a co-the plaintiff with Henry in the main suit, Madam Tan had effectively become his nemesis and was now backing Gary's side in the litigation. As a result of the shift in Madam Tan's allegiance, Henry stood as a minority shareholder as he no longer had the support of Madam Tan and did not command the majority in the companies. He was left in a precarious position.

[12] In any event, and as I said, the reasons which impelled Henry to carry into effect the impugned share transfers are irrelevant as the issue before me is a legal one and may be safely divorced from the facts or motives surrounding the impugned transfer of shares.

Extraordinary general meetings on 11 January 2013

[13] What happened next was that on 11 January 2013, the companies held extraordinary general meetings removing Henry and Todt as directors of the companies ('the 11 January 2013 EGMs'). In Suit No 83, Henry has challenged the validity of the 11 January 2013 EGMs on the basis that Madam Tan had no locus standi to call for or participate in the 11 January 2013 of EGMs as she had by then ceased to be a shareholder of the Companies. However, Madam Tan and Gary maintain that the 11 January 2013 EGMs were properly convened pursuant to s 145(1) of the CA and that Henry was given the requisite notice as a shareholder but he refused to accept service. Thereafter, Gary was reappointed as a director of the companies and the decision was also made to discharge Ong Teik Hoe as company secretary of the companies. Again, I will not embark upon an examination of the validity of the 11 January 2013 EGMs as that is an issue which is to be determined, if at all, in Suit No 83.

[14] On 28 January 2013, Suit No 83 was filed by Henry in the Alor Setar High Court and he immediately obtained an ex parte injunction order dated 28 January 2013 effectively restraining Gary and Madam Tan from acting as directors of the companies and also restraining the implementation of the resolutions passed in the 11 January 2013 EGMs ('the ex parte order'). On 6 February 2013, Gary applied to set aside the ex parte order. Suit No 83 has

since been transferred from the Alor Setar High Court to the Penang High Court. Also, the ex parte order has since lapsed.

[15] Madam Tan and Gary claim that it was through Suit No 83, that they discovered that on 22 November 2012, Henry had transferred all of Madam Tan's shares in the companies into his own name without the knowledge or permission of Madam Tan. I may reiterate that the reason why this was done is not important for present purposes.

The transfer of shares in the companies

[16] There is no dispute that on 22 November 2012, Henry did in fact transfer the following shares:

(a) Madam Tan's 1,078,000 shares in JACSB to himself;

(b) Madam Tan's 1,078,000 shares in HLSB to himself; and

(c) Madam Tan's 1 share in WFSB to himself, (collectively known as the 'the TSH Share Transfers').

[17] Around the same time or shortly thereafter, Henry also executed:

(a) a transfer of one share in JACSB and one share in HLSB to Todt; and

(b) a transfer of one share in JACSB, one share in HLSB and one share in WFSB to his wife, Chou Hui Ying ('CHY'), (collectively known as the 'the Todt and CHY Share Transfers').

Wherever necessary, the TSH share transfers and the Todt and CHY share transfers shall be referred to collectively as 'collectively the impugned share transfers'.

Relief sought in Suit 80

[18] In Suit No 80, Madam Tan as the the plaintiff is suing Henry and Ong Teik Hoe (the company secretary) and is claiming, inter alia, the following reliefs:

(a) perintah deklarasi bahawa plaintif adalah tuanpunya 1,078,000 saham dalam syarikat Juru Auto-City Sdn Bhd (No Syarikat: 137490-H), 107,800 saham dalam syarikat Highway Landmark Sdn Bhd (No Syarikat: 344772-X) dan 1 saham dalam syarikat Western Frontier Sdn Bhd (No Syarikat: 313190-D).

(b) perintah bahawa pemindahan 1,078,000 saham dalam syarikat Juru Auto-City Sdn Bhd (No Syarikat: 137490-H), 1,078,000 saham dalam syarikat Highway Landmark Sdn Bhd (No Syarikat: 344772-X) dan 1

saham dalam syarikat Western Frontier Sdn Bhd (No Syarikat: 313190-D) daripada plaintif kepada defendan pertama dibatalkan.

(c) perintah bahawa Suruhanjaya Syarikat Malaysia, setiausaha syarikat untuk syarikat-syarikat Juru Auto-City Sdn Bhd (No Syarikat: 137490-H), Highway Landmark Sdn Bhd (No Syarikat: 344772-X) dan Western Frontier Sdn Bhd (No Syarikat: 313190-D) dan/atau laln-lain pihak yang berkenaan atau berkaitan mengenai langkah-langkah yang perlu untuk memberi kesan daripada perintah-perintah yang diberikan di sini.

(d) gantirugi seperti yang ditafsirkan oleh Timbalan Pendaftar atau Penolong Kanan Pendaftar Mahkamah Tinggl di Pulau Pinang dibaar oleh Defenan-defendan kepada plaintif.

[19] Madam Tan is therefore seeking to set aside the transfers of her said shares in JACSB, HLSB and WFSB to Henry. Apart from seeking a declaration as to ownership of the said shares, Madam Tan also sought to impugn the share transfers on the basis of it being contrary to s 223 of the CA. This was raised specifically in para 16 of the statement of claim, where she pleaded as follows,

16. plaintif menyatakan bahawa pemindahan saham-saham tersebut pada atau sekitar 22 November 2012 melanggari, antara lain, seksyen 223 Akta Syarikat 1965 kerana pada masa itu sudah ada prosiding-prosiding penggulungan syarikat terhadap JACSB melalui kes Mahkamah Tinggi Pulau Pinang Petisyen Penggulungan No 28–8–2010, terhadap HLSB melalui kes Mahkamah Tinggi Pulau Pinang Petisyen Penggulungan No 28–11–2010 dan terhadap WFSB melalui Petisyen Penggulungan No 28–9–2010.

Suit No 83

[20] Suit No 83 is the action brought by Henry and Todt against Madam Tan, Gary, the companies and SSM, where the the plaintiffs are essentially seeking various injunctive reliefs restraining Gary and Madam Tan from representing themselves, acting and/or performing or carrying out any function or duties as directors and/or shareholders of JACSB, HLSB and WFSB and also various declarations pertaining to Madam Tan's and Gary's actions as directors and/or shareholders of JACSB, HLSB and WFSB on 11 January 2013 and 12 January 2013. The reliefs sought therein are for:

(a) suatu injunksi melarang defendan pertama merepresentasikan dirinya kepada sesiapa dan mana-mana pihak berkuasa dan semua mahkamah dalam jurisdiksi Malaysia sebagai pengarah defendan ketiga, defendan keempat dan defendan kelima sehingga keputusan muktamad seluruh tindakan;

(b) suatu injunksi melarang defendan pertama melaksanakan kuasanya dan bertindak sebagai pengarah defendan ketiga, defendan keempat dan defendan kelima sehingga keputusan muktamad seluruh tindakan ini;

(c) suatu injunksi melarang defendan pertama dan defendan kedua merepresentasikan mereka kepada sesiapa dan mana-mana pihak berkuasa dan semua mahkamah dalam jurisdiksi Malaysia sebagai lembaga pengarah defendan ketiga, defendan keempat dan defendan kelima sehingga keputusan muktamad seluruh tindakan ini;

(d) suatu injunksi menahan defendan pertama dan defendan kedua meluluskan apa-apa resolusi bagi pihak lembaga pengarah defendan ketiga, defendan keempat dan defendan kelima sehingga keputusan muktamad seluruh tindakan ini;

(e) suatu injunksi menahan defendan pertama dan defendan kedua meluluskan apa-apa resolusi mesyuarat agung dalam syarikat defendan ketiga, defendan keempat dan defendan kelima sehingga keputusan muktamad seluruh tindakan ini;

(f) suatu injunksi menahan defendan pertama dan defendan kedua melaksanakan apa-apa resolusi lembaga pengarah yang telah diluluskan oleh defendan pertama bersama dengan defendan kedua dalam defendan ketiga, defendan keempat dan defendan kelima sehingga keputusan muktamad seluruh tindakan ini;

(g) suatu injunksi menahan defendan pertama dan defendan kedua melaksanakan apa-apa resolusi mesyuarat agung yang telah diluluskan oleh defendan pertama bersama dengan defendan kedua dalam defendan ketiga, defendan keempat dan defendan kelima sehingga keputusan muktamad seluruh tindakan ini;

(h) suatu injunksi menahan defendan pertama dan defendan kedua mengadakan mesyuarat agung dan mesyuarat lembaga pengarah dalam syarikat defendan ketiga, defendan keempat, defendan kelima sehingga keputusan muktamad seluruh tindakan ini;

(i) suatu deklarasi bahawa mesyuarat agung luar biasa untuk syarikat defendan ketiga, defendan keempat dan defendan kelima yang diadakan pada 11 Januari 2013 di Flamingo Hotel By The Beach, Silver Flamingo Room, Jalan Tanjung Bungah, 11200, Pulau Pinang adalah tidak sah;

(j) suatu deklarasi bahawa pelantikan semula defendan pertama sebagai pengarah dalam syarikat defendan pertama sebagai pengarah dalam syarikat defendan ketiga, keempat dan kelima pada 11 Januari 2013 menerusi mesyuarat agung luar biasa yang diadakan pada 11 Januari 2013 di Flamingo Hotel By The Beach, Silver Flamingo Room, Jalan Tanjung Bungah 11200, Pulau Pinang adalah tidak sah;

(k) suatu deklarasi bahawa pemecatan plaintif pertama dan plaintif kedua sebagai pengarah dalam syarikat defendan ketiga, keempat dan kelima pada 11 Januari 2013 menerusi mesyuarat agung luar biasa yang

diadakan pada 11 Januari 2013 di Flamingo Hotel By The Beach, Silver Flamingo Room, Jalan Tanjung Bungah 11200, Pulau Pinang adalah tidak sah;

(l) suatu deklarasi bahawa semua resolusi lembaga pengarah yang diluluskan oleh defendan pertama dan defendan kedua sejak 11 Januari 2013 dalam syarikat defendan ketiga, defendan keempat dan defendan kelima adalah tidak sah;

(m) suatu deklarasi bahawa semua resolusi mesyuarat agung yang diluluskan oleh defendan pertama dan defendan kedua sejak 11 Januari 2013 dalam syarikat defendan ketiga, defendan keempat dan defendan kelima adalah tidak sah;

(n) suatu deklarasi bahawa Borang 49 bertarikh 11 Januari 12013 untuk syarikat defendan ketiga, defendan keempat, defendan kelima di defendan keenam adalah tidak sah dan terbatal;

(o) suatu deklarasi bahawa resolusi pengarah-pengarah yang diluluskan oleh defendan pertama dan defendan kedua untuk memecat Ong Teik Hoe sebagai setiausaha syarikat defendan ketiga, defendan keempat dan defendan kelima adalah tidak sah dan terbatal;

(p) suatu deklarasi bahawa notis penukaran alamat berdaftar yang ditandatangani oleh defendan pertama sebagai pengarah bertarikh 12 Januari 2013 untuk defendan ketiga, defendan keempat dan defendan kelima adalah tidak sah dan terbatal;

(q) suatu perintah bahawa defendan keenam membatalkan pendaftaran Borang 49, bertarikh 11 Januari 2013, resolusi pengarah memecat setiausaha syarikat Ong Teik Hoe bertarikh 12 Januari 2013 dan Borang 44 bertarikh 12 Januari 2013 yang difailkan oleh defendan pertama, defendan kedua, defendan ketiga, defendan keempat dan/atau defendan kelima masing-masing bagi pihak defendan ketiga, defendan keempat dan defendan kelima masing-masing;

(r) ganti rugi am;

(s) ganti rugi teladan;

(t) ganti rugi teruk;

(u) faedah pada kadar 5% setahun ke atas apa-apa award monetari oleh mahkamah yang mulia ini dari 11 Januari 2013 sehingga tarikh penyelesaian penuh penghakiman;

(v) kos;

(w) lain-lain relief yang dianggap sesuai dan manfaat oleh mahkamah yang mulia ini.

[21] A perusal of the statement of claim in Suit No 83 shows that the the plaintiffs' entire cause of action is predicated on the transfers of Madam Tan's said shares to Henry on 22 November 2012. Paragraphs 18,19 and 20 of the statement of claim state as follows:

> 18. Sejak 22 November 2012, Defendan Kedua bukan seorang pemegang saham dalam Defendan Ketiga, defendan keempat dan Defendan Keempat kerana telah memindahmilik semua saham-sahamnya kepada Plaintif Pertama.
>
> 19. Pindahmilik saham semua saham Defendan Kedua tersebut telah diluluskan oleh lembaga pengarah dalam mesyuarat lembaga pengarah Defendan Ketiga, Defendan Keempat dan Defendan Kelima yang diadakan pada 22 November 2012.
>
> 20. Akan tetapi, pindahmilik saham syarikat Defendan Kelima oleh Defendan Kedua kepada saya belum disempurnakan dan direkodkan ke dalam buku daftar pemegang saham kerana borang pindahmilik saham 32A belum disetemkan lagi

[22] Thus it can be seen that the entire cause of action in Suit No 83 is founded on the factual premise that from or since 22 November 2012, Madam Tan was no longer a shareholder of JACSB, HLSB and WFSB. Consequently, it is Henry's position that the 11 January 2013 EGMs to remove him and Todt as the directors in the companies are illegal, null and void for failure of quorom and that the directors and/or shareholders were not notified or informed of the purported EGM. It is accordingly alleged that Madam Tan lacked locus standi to call for an EGM as she was no longer a shareholder of the companies. At the time the EGM was convened there was also a failure of quorom because Madam Tan was no longer a shareholder of the companies by virtue of the transfer of the shares to Henry on or about 22 November 2012.

[23] It is against the above stated background or matrix of facts that Madam Tan is seeking via her O 14A application ('encl 33') for a question of law to be determined, ie whether the TSH share transfers on 22 November 2012 breached s 223 of the CA and are therefore null and void and of no effect. Likewise, Gary is seeking via his O 14A application ('encl 36') for a similar question of law to be determined, ie whether or not the Todt and CHY share transfers are also in breach of s 223 of the CA and should also be considered as null and void and of no effect.

Scope of O 14A application

[24] Henry's side made much of the fact that the O 14A applications will not dispose of the entire case and may at best determine just one issue, which is not the dominant issue in both Suit No 80 and Suit No 83. However, Madam Tan and Gary's side say that the O 14A applications deal with a dominant issue which arose in both the suits namely the validity of the impugned share

transfers and that the O 14A applications are not rendered unsuitable merely because they do not dispose of the entire case in both suits.

[25] I will first set out O 14A r 1 of the ROC which provides as follows:

> Determination of questions of law or construction (O 14A, r 1):
>
> (1) The Court may, upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that —
>
> (a) such question is suitable for determination without the full trial of the action; and
>
> (b) such determination *will finally determine* the entire cause or matter *or any claim or issue therein.*
>
> (2) On such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.
>
> (3) The Court shall not determine any question under this Order unless the parties have had an opportunity of being heard on the question.
>
> (4) The jurisdiction of the Court under this Order may be exercised by a registrar.
>
> (5) Nothing in this Order shall limit the powers of the Court under order 18 rule 19 or any other provision of these Rules.
>
> (Emphasis added.)

[26] Counsel for Madam Tan/Gary referred to the decision of the Court of Appeal in *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu* [2004] 1 MLJ 8 (CA) ('the *Petronas*'s case') where the court examined the scope of an application made under O 14A of the then Rules of the High Court 1980 and said, that O 14A is suitable for determination of a point of law, albeit that the whole case will not be disposed of. In that case the Court of Appeal opined that it is sufficient if substantial matters can be disposed of and that the real and crucial question at the end of the day is whether the court will be able to dispose of the case or the major part of the case or the most significant issue in the case under O 14A application. I may quote the relevant passages from that case as follows:

> *The whole case does not have to be disposed of. It is sufficient if substantial matters can be disposed of.*
>
> The real question in this case at the end and really crucial one it seems to me is: will *the court be able to dispose of the case or the major part of the case or the most significant issue in the case under Order 14A dealing with the matter today.*
>
> …

> 14 This position was followed by the Singapore Court of Appeal and the High Court when dealing with O 14 r 12 of the Rules of Court, our equivalent of O 14k, which recognised that resort to the procedure can be made to even where it does not dispose of the entire cause or matter …

(see para 13 at p 19 of the judgment).

[27] It is clear from words as appearing in O 14A as emphasised above, that is, 'such determination *will finally determine* the entire cause or matter *or any claim or issue therein*' and the principle that may be distilled from decision of the Court of Appeal in the *Petronas*' case as abovementioned, that for the court to exercise its powers under O 14A, the whole case does not have to be disposed of and that it is sufficient if substantial matters can be disposed of. Where the question for determination is a dominant feature of the case, then the court ought to proceed to so determine such a question under O 14A. The real question for the court in an O 14A application is whether the court will be able to dispose of the case or a major part of the case or the most significant issue in the case.

[28] In this regard, for Suit No 83, it was argued for Madam Tan that if this court rules in her favour and declares the impugned share transfers as null and void, then Madam Tan and Gary as the majority shareholders will be in control of the companies and as the majority, they will be able to regularise the 11 January 2013 EGMs and sanitise the defects caused by the alleged corum failure. Also, as the majority, Madam Tan and Gary will be able to ratify the resolutions passed at the 11 January 2013 EGMs. With that, they say that the substratum of Suit No 83 will fall. As for Suit No 80, counsel took no clear position as to what he would do if a ruling was made in Madam Tan's favour under encl 33 but he did say that the issue as to invalidity of the impugned share transfers were specifically pleaded and that a declaration was sought in order to set aside the impugned transfer of shares.

[29] Of course, one cannot ignore the fact that Madam Tan had by prayer (i) of her statement of claim put into issue the ownership of the shares and in this regard, Henry maintained that the shares held by Madam Tan were held on trust for him. In this respect, I was referred to the various documentary evidence to substantiate Henry's position that Madam Tan merely held the shares in trust for him. Counsel for Madam Tan pointed to several matters and statutory provisions under the CA in an effort at demonstrating that the theory of shares held in trust is inherently incredible or unsustainable as a matter of law. I do not intend to rehash all the evidence that was shown to me or the legal submissions that were made. It would suffice for me to say that there is certainly an issue as regards ownership of the relevant shares which had been transferred from Madam Tan to Henry on 22 November 2012.

[30] Henry's side contend that the issue of real ownership of the shares must be decided first before the issue of validity of the transfer can be determined and that the only way the issue of ownership can be decided is by way of viva voce evidence by calling Madam Tan and Henry to give evidence at trial. It was submitted for Henry that an application pursuant to O 14A of the Rules of Court 2012 must be one which goes to the very root of the cause of action. It must solve the entire action once and for all. It is obviously unsuitable and unsafe in the circumstances to avail oneself of the O 14A procedure, as it gives rise to various issues that need to be tried as aforementioned. It was submitted for Henry that as the party opposing the O 14A applications, all that needs to be shown is an issue to be tried and with that the entire O 14A application will necessary fall. See: *Noh Hyoung Seok v Perwira Affin Bank Bhd* [2004] 2 MLJ 203 pp 210–212.

[31] It was contended for Henry that the core issue in Suit No 80 and Suit No 83 is the ownership of the shares which had been transferred on 22 November 2012 and since that issue is a contentious one, the O 14A applications should fail. However, counsel for Madam Tan and Gary maintain that the facts necessary for the determination of the O 14A applications are undisputed, that is, that as at 22 November 2012 the winding up had already commenced and that Madam Tan's shares were transferred without any validation by the court (meaning the winding up court).

[32] Ultimately, the view I took is that the questions that arose under the O 14A applications are purely legal ones and the facts necessary for the determination of these legal issues are predicated on matters that are not in dispute ie the winding up petitions in respect of the companies which were all presented in 2010 and the impugned share transfers which took place on 22 November 2012, without any court order to validate the same. As such, it was clear that although there was a factual dispute in relation to Madam Tan's ownership of the said shares in the companies, that factual dispute was not relevant to and did not infect the Madam Tan's O 14A application. As for Gary's O 14A application, there was no issue of ownership of shares and the only issue was of the validity of the Todt and CHY share transfers.

[33] To conclude on this point, I may say that the issue as to the validity of the TSH share transfers is a substantial or significant issue that arose under Suit No 80 and Suit No 83. As such, even accepting that the issue of ownership of Madam Tan's shares is a disputed one, I saw nothing in the point taken by Henry's side when it was said that the O 14A applications only deal with one issue ie the validity of the transfer of shares and does not dispose of the entire suit. Whilst it is true that the O 14A applications will not in themselves conclude both the actions, the resolution of both applications will definitely determine a significant, if not, the most significant aspect of both the actions.

As for Todt and CHY share transfers, it follows that if Madam Tan succeeds in her O 14A application, then Gary's O 14A application will likewise succeed.

First issue: the impugned transfer of shares

[34] The first issue has previously been examined in a few cases before the High Court where it has been held consistently that s 223 of the CA only applies where it involves disposition of property of the company and in the context of shares, it does not apply if it involves disposition of shares not owned by the company (which is the target of the winding up petition). The juridical basis for such a view, has hitherto been that the purpose and intent behind s 223 of the CA is to protect creditors of the company against disposal of assets belonging to the company. As such, the view previously held in Malaysia at least, as may be seen from the cases that came before the High Court is that transfer of shares as between shareholders inter se and/or as between shareholders and third parties such as purchasers under a share sale agreement or parties to a put option are not affected by the prohibition in s 223 of the CA. The theory has been that these shares are not property of the company and as such are not caught by the prohibition in s 223 of the CA.

Section 223 of the CA provides:

> Any *disposition of the property of the company* including things in action *and any transfer of shares or alteration in the status of the members of the company* made after the commencement of the winding up by the Court shall unless the Court otherwise orders be void.
>
> (Emphasis added.)

[35] In this regard, counsel for Henry relied on *Nadaraja a/l Muthu & Ors v Palanisamy a/l Ramasamy* [2003] 2 MLJ 523; [2003] 8 CLJ 403 ('*Nadaraja*'s case'), *BIMB Musyarakah Satu Sdn Bhd v Lee Kik Hooi & Ors* [2009] 8 MLJ 711; [2009] 8 CLJ 529 ('*BIMB*'s case'), *Perbadanan Nasional Berhad v Dato' Ibrahim bin Ali* [2012] MLJU 925; [2012] 1 LNS 585 ('*PNB*'s case') and *Lim Chiew v Siteman Construction Sdn Bhd v Khairul Anuar Bin Mamat* Kuala Lumpur High Court Companies Winding Up No D-28NCC–186 of 2010 ('*Lim Chiew*'s case') (unreported). *Nadaraja*'s case is that starting point. Then, *BIMB*'s case followed the *Nadaraja*'s case. Later, *PNB*'s case applied *BIMB*'s case, without specifically referring to the *Nadaraja*'s case. Then comes the *Lim Chiew*'s case which directly applied the *Nadaraja*'s case for the proposition that s 223 of the CA must be read conjunctively and that transfer of shares which do not entail or involve disposition of the company's property do not come within the purview of s 223 of the CA. These four cases are all decisions of the High Court.

[36] The leading case on this topic appears to the *Nadaraja*'s case and it is this

case that must be critically examined. In the *Nadaraja*'s case, the the plaintiff (judgment creditor) was seeking to obtain an order for sale of shares owned by the the defendant (judgment debtor) in a company called Biografik (M) Sdn Bhd is respect of which the the plaintiff had previously obtained a charging order absolute. In resisting the order for sale, the the defendant (judgment creditor) made the following argument in respect of the sale of Biografik (M) Sdn Bhd shares, predicated on the footing that the company was facing winding up petitions (of which there was no evidence before the court). The argument taken by counsel was that:

> … in light of the alleged couple of winding up petitions against Biografik (M) Sdn Bhd commenced prior to this instant application, any transfer of Biografik shares would be an alteration in the status of the members of the company. And, that s 223 of the Act comes into play, as the the plaintiffs failed to secure the benefits of the charging orders before the commencement of the winding up. Further, the the defendant argued that it was only opened to the winding up court to make an order under s 223 of the Act.

[37] The learned judge gave short shrift to that submission and this is found in p 409 at para (d), where he said,

> conversely the the defendant's unconventional interpretation of s 223 of the Act is unsupported by any case law.

[38] In the *Nadaraja*'s case it was held that the true intention of the section is to safeguard the company's property and not that of the individual shareholders. The court held that the purpose of s 223 of the CAis, inter alia, to prevent the disposal or dissipation of a company's assets or properties between the date of the presentation of the petition and the date of winding up order to the detriment if its creditors. In that case, the court had held that the words 'disposition of property of the company ought to be read conjunctively with the phrase 'and any transfer of shares or alteration in the status of the member of the company' in s 223 of the CA.

[39] As such, the court concluded that the transfer of shares which do not entail or involve disposition or dissipation of the company's property do not come within the purview of s 223 of the CA (see p 406 paras (e)–(f) of the judgment). In the *Nadaraja*'s case, the late Justice Vincent Ng J went on further to say:

> It is also trite law that s 223 of the Act applies to creditors of the company and its true purpose is to protect the property of the company for equal distribution amongst the unsecured creditors of the company in question. The true intention of the section is to safeguard the company's property and not that of its individual shareholders. In my considered view, the sole test to determine whether execution of

> the charging order in the instant case is caught within s 223, is to ask whether such execution would affect the property of the company through effecting improper alienation or dissipation of its property. Thus, I would hold that the words 'disposition of property of the company' ought logically be read conjunctively with the phrase 'and any transfer of shares or alteration in the status of member of the company' in s 223. It would follow that transfer of shares which do not entail or involve disposition or dissipation of the company's property do not come within the purview of s 223. This has been clearly elucidated by Lord Cairns LJ in *Re Wiltshire Iron Company ex parte Pearson* [1868] 3 Ch App 443, when he considered the English equivalent of our s 223 of the CA and *Re Al Levy (Holdings) Ltd* [1964] 1 Ch p 19.

[40] As noted earlier, the *Nadaraja*'s case was subsequently applied in other cases. One case in particular is the *BIMB*'s case, where it was contended for the the defendant/shareholders that the dispositions of shares via the put option agreement after winding up proceedings had already commenced against the company is void and cannot be enforced and accordingly, no disposition of shares of the company could be effected without the sanction of the court as it would amount to a contravention of s 223 of the CA. Justice Nallini Pathmanathan disagreed. She referred to a passage from the judgment of the Supreme Court in *Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449 and held as follows:

> s 223 serves to prohibit the improper alienation and dissipation of the property of, or belonging to a company made between the time when a winding up petition is presented and the order for winding up is made, unless the court otherwise orders. This begs the question, what is the property of the company in the instant case that is sought to be transferred? In the instant case, it is BIMB Musyarakah that seeks to enforce a put option agreement, ie BIMB Musyarakah seeks to force the the defendant shareholders to purchase its shares in the company. In other words, BIMB Musyarakah seeks to make, inter alia, the second the defendant purchase the shares it owns in the company at the option price. It therefore becomes apparent that it is not the company's property that is the subject matter of the purchase and thereby disposition, but the property of BIMB Musyarakah. The property of BIMB Musyarakah comprises 612,500 shares in the company. In short BIMB Musyarakah is seeking to enforce its right to sell to the shareholders of the company its shares, at a price which was agreed upon in the put option agreement. If it is not the property of the company, but the property of BIMB Musyarakah that is sought to be sold, then it would appear that s 223 of the Companies Act 1965 does not come into play.

(see para 17 of the judgment).

[41] In the *BIMB*'s case, the court also relied upon the *Nadaraja*'s case as supporting the proposition that transfer of shares, not owned by the company are not property of the company and are therefore not caught by s 223 of the CA. Next, the *BIMB*'s case (and by extension the *Nadaraja*'s case) was followed by Lee Swee Seng JC in the *PNB*'s case.

[42] Recently, YA Datin Hjh Azizah bt Hj Nawawi JC in the *Lim Chiew*'s case also applied the *Nadaraja*'s case and held that:

> [9] In the present application there is nothing to show that the transfer of shares to the applicant entails or involves any disposition or dissipation of the company's property. In the premise, s 233 is not applicable to the transfer of shares to the applicant, registered after the winding up of the company. The transfer of shares cannot be said to be void …

[43] It was accordingly submitted for Henry that following *Nadaraja*'s case, the words in the s 223 of the CA, 'disposition of the property of the company' did not encompass shares which are not owned by the company and therefore the transfer of the said shares on 22 November 2012 was not caught by s 223 as the shares are the interest and property belonging to Henry and not property belonging to the companies.

Submissions (made on behalf of Gary/Madam Tan)

[44] On the other hand, Mr Greg Ling, counsel for Gary, by way of his comprehensive and comparative analysis of case laws and legislation drawn from Malaysia, Singapore and Australia launched a major offensive and challenged the correctness of the four High Court cases namely, the *Nadaraja*'s case, *BIMB*'s case, *PNB*'s case and *Lim Chiew*'s case.

[45] He started by saying that the *Nadaraja*'s case was wrongly decided and the courts in the other cases fell into error in following the *Nadaraja*'s case. He criticised *Nadaraja*'s case and the cases that followed it in the following manner. Essentially he said that *Nadaraja*'s case had relied on cases which had involved dispositions of property belonging to the company whereas the issue before the learned judge in that case was not property belonging to the company but rather shares of the company, in respect of which the judgment creditor was seeking to obtain a order for sale of the shares owned by its shareholder who was the judgment debtor. He pointed out that the High Court in the *Nadaraja*'s case had relied on two English cases which did not concern a transfer of shares.

[46] First, is the case of *Re Wiltshire Iron Co ex parte Pearson* (1868) 3 Ch App 443 ('*Re Wiltshire*') which dealt with the issue of a 'disposition of property of a company' ie, the company's iron and was not a case concerning the 'transfer of shares' of the said company. Therefore, when Lord Cairns LJ interpreted the then UK Act of s 153 of the Companies Act 1862 (which is pari materia with our s 223 of the CA), His Lordship was merely focusing on the issue of a 'disposition of property'. Hence the *Re Wiltshire*'s case did not call for the interpretation of the phrase 'transfer of shares', and its conclusion must be confined to its facts.

[47] Secondly, the court relied on the case of *Re A I Levy (Holdings) Ltd* [1964] 1 Ch 19 which concerned the sale of leasehold shop premises belonging to the company in question. Again, it did not concern the 'transfer of shares' of the company. Likewise, it was submitted that the *Re A I Levy*'s case could not be used to support the proposition that the phrase 'transfer of shares' must be read conjunctively with the phrase 'disposition of the property of the company'.

[48] In *Nadaraja*'s case, the the plaintiffs applied for an order of sale of the shares that were subject to a charging order. The the defendant's objection was based on s 223 of the CA, in view of the winding up proceedings commenced against the company prior to the the plaintiffs' application. The argument in relation to s 223 of the CA is to be found at pp 406 and 407 of the judgment, in particular the following passages,

> (i) The the plaintiffs' application is for recovery of two money judgments against a the defendant by means of charges against his personal property, which although is in the form of company shares, has nothing to do with the company itself. In other words, the the plaintiffs are the creditors of the shareholder, not the company.
>
> (ii) It is also trite law that s 223 of the CA applies to creditors of the company and its true purpose is to protect the property of the company for equal distribution amongst the unsecured creditors of the company in question. The true intention of the section is to safeguard the company's property and not that of its individual shareholders. In my considered view, the sole test to determine whether execution of the charging order in the instant case is caught within s 223 of the CA, is to ask whether such execution would affect the property of the company through effecting improper alienation or dissipation of its property Thus, I would hold that the words 'disposition of property of the company' ought logically be read conjunctively with the phrase 'and any transfer of shares or alteration in the status of member of the company' in s 223 of the CA. It would follow that transfer of shares which do not entail or involve disposition or dissipation of the company's property do not come within the purview of s 223 of the CA.
>
> (iii) …
>
> (iv) …
>
> (v) Conversely, the the defendant's unconventional interpretation of s 223 of the CA is unsupported by any case law. Reliance on *Re Overseas Aviation Engineering (GB) Ltd* [1962] 3 All ER 12 is clearly flawed as Lord Denning's judgment starts out by identifying that

[49] The late Justice Vincent Ng predicated his decision on the basis of there being no case law to support the contention that s 223 of the CA invalidated transfer of shares per se if winding up proceedings had been commenced before the transfer transaction. His Lordship also decided that the true purpose of s 223 of the CA is to protect the property of the company for equal distribution

amongst the unsecured creditors of the company. According to counsel, the *Nadaraja*'s case was decided per incuriam.

[50] In the present case, learned counsel said that a literal reading of s 223 of the CA shows that it is to be read disjunctively. That section clearly refers to 'Any disposition of the property of the company … and any transfer of shares or alteration in the status of the members of the company …'. The use of the word 'any' twice there together with the word 'and' in between them shows that the section envisages two separate situations, ie disposition of the property of the company and transfer of shares or alteration in the status of the members of the company.

[51] Then counsel pointed out that in the *BIMB*'s case at p 537 of the judgment, the High Court was referred to the case of *Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449; [1988] 1 LNS 44 in an attempt to interpret the purpose and effect of s 223 of the CA. However, he pointed out that the *Lian Keow*'s case concerned the issue of a disposition of property of the company, ie the transfer of three portions of land and that it was in that context that the Supreme Court referred to the *Re Wiltshire*'s case as it also concerned a 'disposition of property'. To the extent that the High Court in the *BIMB*'s case had referred to the *Kimoyama Elektrik (M) Sdn Bhd v Metrobilt Construction Sdn Bhd* [1990] 3 MLJ 309; [1990] 2 CLJ (Rep) 253 and the case of *Kok Fook Sang v Juta Villa (M) Sdn Bhd & Ors* [1996] 2 MLJ 666, counsel says that both cases referred to facts pertaining to a 'disposition of property'.

[52] Next, in so far as the *PNB*'s case was concerned, learned counsel said that that case merely applied the *BIMB*'s case (and by extension the *Nadaraja*'s case). In the *PNB*'s case, the court also referred to the Singapore case of *Kong Swee Eng v Rolles Rudolf Jurgen August* [2011] 1 SLR 873 which interpreted Singapore's s 259 of the Companies Act (Cap 50, 2006 Rev Ed) (the equivalent of our s 223 of the CA) wherein the Singapore High Court referred to an Australian decision called *Jordanlane Pty Ltd v Kimberley Jane Elizabeth Kitching Andrew* [2008] VSC 426 which concerned Australia's then s 468 of the Corporations Act 2001 (also the equivalent to Singapore's s 259 and our s 223 of the CA).

[53] Counsel says that the court in *PNB*'s case had construed the *Jordanlane*'s case as supporting the proposition laid out in the *BIMB*'s case, ie that a transfer of shares of the company itself would not be caught by s 223 of the CA (as it did not amount to a disposition of its property). Learned counsel before me, pointed out that in *Jordanlane*'s case, the Supreme Court of Victoria had actually interpreted the then s 468 of the Corporations Act 2001 to mean that if there was an agreement to sell and transfer shares which was executed after

winding up had commenced, *the provision would render the transfer of shares itself void but not the agreement*. The innocent party could still rely on the share sale agreement to seek relief against the guilty party. In this regard, reference was made to the following portion of the *Jordanlane*'s case at p 4, para 14:

> Whilst any transfer of shares made after the commencement of a winding up is void unless appropriately sanctioned so far as regards any effect to be given to it by the company, a contract to transfer shares is not rendered void by the section as between the parties themselves. This is because the purpose of s 468(1) in relation to the transfer of shares is to prevent a shareholder from evading liability as a contributory by transferring shares to some impecunious person after a winding up has commenced and this purpose is sufficiently served by avoiding the transfer only so far as the company is concerned.

[54] Counsel then pointed out that s 468 of the Corporations Act 2001 has since been amended via the Corporations Amendment (Insolvency Act 2007 (Cth) (No 132 of 2007) and a new s 468A has been introduced. In this regard, reference was made to *Carringbush Corporation Pty Ltd v Australian Securities And Investments Commission* [2008] FCA 474 at para 3. In essence, the phrase 'and any transfer of shares or alteration in the status of the members of the company has been taken out of s 468(1) and placed in the new s 468A(1). Hence, s 468A(1) is a completely separate section dealing specifically with the 'any transfer of shares or alteration in the status of the members of the company'.

[55] On the other hand, the new s 468(1) would deal solely with *'dispositions of the property of the company'*. Counsel submitted that the Australian Parliament had intentionally split the phrases *'disposition of property'* and *'transfer of shares'* into two different sections to avoid them being read conjunctively. In this regard, it was further submitted that the equivalent sections in other jurisdictions that are the same or similar to our s 223 of the CA, all appear to read the phrases 'disposition of property' and 'transfer of shares' disjunctively. The position in Australia prior to the 2007 introduction of s 468A is set out in the abovementioned *Jordanlane*'s case and in the *Carringbush*'s case and it is read disjunctively.

[56] Counsel said that the *Kong Swee Eng*'s case is a clear example of the position that:

> the primary purpose of Section 259 of the Companies Act (Cap 50, 2006 Rev Ed) was to prevent a shareholder from evading liability as a contributory bv transferring shares to some impecunious person after the commencement of winding up but the transaction could be avoided only as far as the company was concerned. A purchaser of shares, such as the the plaintiff, could not avoid completion in respect of agreements which were entered into prior to the commencement of winding up, even if the company should subsequently be wound up.

A He said that the Singapore High Court had clearly acknowledged that the transfer of shares post commencement of winding up, can be avoided as far as the company was concerned.

B **[57]** Moving to the United Kingdom, in respect of the current s 127 of the Insolvency Act 1986, counsel referred to the book *McPherson's Law of Company Liquidation* by Andrew R Keay (2nd Ed) where the learned author considers the 'transfer of shares' phrase independent of whether there is or is not a disposition of company property. He also referred to the commentary at para 7.031 at pp 366 to 367.

C

[58] Then in an effort at demonstrating the older United Kingdom provision of s 153 of the Companies Act 1862, counsel referred to the case of *In Re London, Hamburg, and Continental Exchange Bank; Emmerson's case* (1866) LR 2 Eq 231 where it was held that s 153 applied to a transfer of shares of the company itself, rendering the said transfer void. The court then proceeded to determine whether or not a purchaser can be compelled to proceed with an agreement to purchase shares of a company entered into in ignorance that winding up proceedings had commenced. On appeal, the Court of Appeal reversed the decision of the lower court as to the treatment of the agreement but affirmed the application of s 153 only in so far as it could void the transfer of the shares itself. See *In Re London, Hamburg, and Continental Exchange Bank; Emmerson's case* (1866) 1 Ch App 433.

D

E

F **[59]** Likewise, the subsequent s 227 of the Companies Act 1948 (UK) was similarly interpreted in the case of *Sullivan v Henderson* [1973] 1 All ER 48 whereby at pp 50–51, it was held that s 227 would, unless the court ordered otherwise, render the transfer of shares of a company pursuant to an agreement of the sale of shares void if it was made after the commencement of winding up proceedings. Again, there was no necessity for there to be a disposition of company property.

G

[60] In *Sullivan v Henderson* [1973] 1 All ER 48, Megarry J refused to order specific performance of a contract for sales of shares because of a statutory provision in pari materia with our s 223 of the CA. There the court had to deal with a claim for specific performance of a contract for the sale of shares in a company after the commencement of winding up proceedings against the company. The court looked at s 227 of the Companies Act 1948 (UK) which is in pari materia with our s 223.

H

I

[61] Megarry J in dismissing the claim for specific performance stated as follows at pp 50–51:

> (i) One question that arises is whether there is a case for specific performance at

all. What is sought is a decree of specific performance of a contract for the sale of shares in a company (whichever company it is) that was made before the commencement of the compulsory winding-up of the company, but is being enforced after that winding-up has commenced. The Companies Act 1948, s 227, reads as follows:

1. In a winding up by the court, any disposition of the property of the company, including things in action, and any transfer of shares, or alteration in the status of the members of the company, made after the commencement of the winding up, shall, unless the court otherwise orders, be void.

(ii) It may thus be said that the the plaintiff is seeking specific performance of a contract which statute has declared to be void unless the court (that is, the Companies Court) otherwise orders. Without canvassing the question of whether a judge of the Chancery Division, when not sitting for the purpose of exercising the court's company winding-up jurisdiction, could make an order under the section, or whether this is a fit case for such an order, counsel for the the plaintiff contended that *Re Onward Building Society showed that the word 'void' in the section merely meant void quoad the company and not void as between vendor and purchaser.* He accepted, however, that even on this footing there may be grave reasons why no order for specific performance should be made in such a case. If before any question of a winding-up has arisen, V contracts to sell shares in a company to P, and then, after a winding-up order has been made, V sues P for specific performance, I think that any court would be most reluctant to force upon P, who had agreed to take a fully effective transfer of the shares, a transfer that, although valid as between him and the vendor, would be void as against the company. Counsel for the the plaintiff was not able to contend for any contrary view; and in my judgment it would require remarkable circumstances to support making a decree in such a case. This plainly is not such a case, and in my judgment the claim for specific performance must fail.

[62] In *Re Onward Building Society* [1891] 2 QB 463 the principle was laid down as follows:

In the case of a sale and transfer of shares in a company after a compulsory winding-up order, the transferee is not entitled to be registered as owner of the shares without the sanction of the court: the court has power to order the rectification of the share register of members by the insertion of such transferee's name: but the exercise of that power is discretionary, and such an order ought not to be made except on strong grounds. The English Court of Appeal speaking through: Lord Esher MR said, at page 474 of the judgment that, ' … if a transfer made between the commencement of the winding-up and the winding up-order is void so far as recognition of it by the company is concerned, unless the court otherwise order, a fortiori a transfer made after the winding-up order would be void.' Next at page 475, he said, 'if the parties choose to make such a contract, it may be good as between themselves, though, if either of them desires that any effect should be given to it by the company, the Act does apply.'

[63] In *Foong Thian Fook v Official Receiver and liquidator of Thow Hai Guan Sdn Bhd and third party* [1996] MLJU 243, Chin Fook Yen J relying on the UK case of *Re Onward Building Society* refused an application under s 223 of the CA to validate a transfer of shares after the commencement of winding up proceedings.

[64] In the Australian case of *Carringbush Corporation Pty Ltd v Australian Securities And Investments Commission* [2008] FCA 474 the court looked at s 468(1) of the Corporations Act 2001, which is similar to our s 223 of the CA, to determine the validity of transfer of shares. In that case, the court clearly acknowledged that the relevant section deals with two distinct situations. Greenwood J stated as follows:

> 24. The considerations that derive from an assessment of whether a 'disposition of property' of the company ought to be approved are quite different from those immediately relevant to a transfer of shares especially where the shares are fully paid and thus no calls can or will be made upon the shareholder.
>
> 25. As to share transfers, the principles seem to be these.
>
> 26. As between the parties to a transfer and as regards the liability of one to the other, (that is, the inter partes position) the transaction is not affected by (the section) (Rudge v Bowman, Law Rep 3 QB 689). The transfer is void 'so far as regards any effect to be given to it by the company' (In *Re Onward Building Society* (1891) 2 QB 463 per Lord Esher at p 475). The parties might choose to make a contract and it 'may be good as between themselves, though if either of them desires that any effect should be given to it by the company the Act does apply…

[65] In the New South Wales case of *Klaus Maertin Pty Ltd (in liq); Maertin v Klaus Maertin Pty Ltd* [2009] NSWSC 618), Austin J, explicitly stated as follows,

> 23. The share transfers were not, of course, dispositions of property of the company, but tucked away in subsection (1) is the proposition that a transfer of shares made after the commencement of the winding up is void unless the court otherwise orders …

[66] Finally, learned counsel for Gary, relied on the decision in *Hendricks International Hotels & Resorts Ltd v YTL Hotels & Properties Sdn Bhd & Ors* [2003] 3 MLJ 742; [2003] 4 AMR 359 ('*Hendricks*' case') wherein the Court of Appeal appears to have taken the approach that was taken by the courts in Australia, Singapore and the United Kingdom and contrary to the position set out in the *Nadaraja*'s case.

[67] In the *Hendrick*'s case the appellant had filed a petition pursuant to s 181 of the CA in respect of a joint venture company with the first respondent

and sought prayers 1 (a) and (b) seeking the court to order that the appellant's shares in the joint venture company be purchased by the first respondent either at the fixed price or upon a valuation by a firm of independent auditors. Shortly thereafter, the joint venture company was wound up pursuant to a winding up petition that had been presented against the same company by the first respondent earlier. The first to the third respondents therefore applied to strike out the appellant's 181 petition and succeeded in the High Court. The appellant appealed to the Court of Appeal who, by a majority decision, affirmed the decision of the High Court in striking out the appellant's 181 petition. At p 371, one of the reasons applied by the Court of Appeal was that the appellant's 181 petition could not be maintained after a winding up order had been granted due to s 223 of the CA. In this regard, the court held that *prayers 1 (a) and (b) could not be entertained as it required a transfer of shares after the commencement of the winding up proceeding.*

[68] Again, counsel relied on that case in aid of the proposition that the Court of Appeal had read the phrase 'transfer of shares' independent of 'disposition of the company property', otherwise their reasoning would not fit the circumstances of the case. This court was then asked to depart from the position taken in the three High Court cases and to follow the position set out by our Court of Appeal and in United Kingdom, Australia and Singapore.

[69] Accordingly, counsel submitted that s 223 of the CA had been misinterpreted in the *Nadaraja*'s case. He said, the words 'disposition of the property of the company' in s 223 of the CA clearly ought to be read disjunctively from the phrase *'and any transfer of shares or alteration in the status of the members of the company'.*

[70] Consequently, it was submitted that since Henry has to date not applied for any validation order under s 223, the transfers of Madam Tan's shares to Henry are therefore be void. Reference was then made to *Zulpadli & Edham v Inai Offshore & Marine Engineering Sdn Bhd (in Liquidation)* [2011] 4 MLJ 161; [2012] 2 AMR 95 (*Zulpadli*'s case), where the Court of Appeal stated as follows at p 161 (MLJ); pp 103–104 (AMR):

> [21] On the facts of the present case, a validation order under s 223 was the only daoble option. But there was no application from the appellant for such an order. Winding-up had commenced against Inai on June 29, 2009, that is, at the time of the presentation of the petition of winding-up (see s 219(2) of the Companies Act 1965). Without an order of validation, that remittance of RM1,400,000 to the appellant on August 19, 2009, which was clearly a disposition of the property of Inai after commencement of winding-up, was void (see *Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449; *Kimoyama Elektrik (M) Sdn Bhd v Metrobilt Construction Sdn Bhd* [1990] 3 MLJ 309; *Re Gray's Inn Construction Co Ltd* [1980] 1 All ER 814; and *In re Ashmark*

Ltd (in liquidation) 2 IR 10, amongst a host of authorities on s 223 or equipollent provision). 'The disposition rendered void is void at the time it takes place' (see McPherson, *The Law of Company Liquidation*, (4th Ed), p 222).

[22] Without a charging order or an order of validation, the entire remittance to the appellant was void. The entire remittance must be returned to Inai.

[71] Based on the facts of the present case and applying the principle as enunciated in the *Zulpadli*'s case, it was submitted for Gary/Madam Tan that without an order of validation, the impugned transfers are likewise void.

Findings (on s 223 Companies Act 1965)

[72] There is no dispute that in so far as the companies are concerned, winding up had commenced at the time when the winding up petitions had been presented on the respective dates when they were filed in the winding up court. Hence, even though the winding up order may be made later, by virtue of s 219(2) of the CA, winding up is deemed to have commenced upon presentation of the winding up petition.

[73] In the present case, winding up commenced in 2010 when the winding up petitions were presented, whereas the impugned transfer of the shares of the companies took place on 22 November /2012, that is, after commencement of winding up. The relevant shares that were transferred were not owned by the companies but rather they were shares in the companies and as such were not property of the companies. They were, at least in the case of Madam Tan, shares in the companies which were registered in her name and then transferred into Henry's name without any validation by the winding up court pursuant to s 223 of the CA.

[74] However, *Nadaraja*'s case as well as the cases that followed *Nadaraja*'s case, that is *BIMB, PNB* and *Lim Chiew*, say that since these shares are not property of the companies, therefore the transfer of the shares do not fall within the ambit of s 223 of the CA. This will be the position if we accept *Nadaraja*'s case as having been correctly decided. Ordinarily, by reason of the need for mutual respect for the decisions of a court of coordinate jurisdiction and for purposes of judicial comity, I would be obliged not to differ from the decision of the other court.

[75] However, there is authority which supports the proposition that if I am convinced that the decision reached in the earlier case was erroneous or per incuriam, then I am at liberty to depart from it.

[76] In *Sundralingam v Ramanathan Chettiar* [1967] 2 MLJ 211 at p 213). Ong Hock Thye FJ speaking for the Federal Court said,

> Each court, of course, is bound by the decisions of courts above it, but 'individual judges are not bound by each other's decisions, although judicial courtesy naturally requires that they do not lightly dissent from the considered opinions of their brethren': see *Law in the Making* (6th Ed) p 231. I do not think I can usefully add anything to what Sir Carleton Allen said, except to point out that, within the past decade and even the last lustrum, judges in Malaya have, on several occasions respectfully agreed to differ, as may be seen from the reports in The Malayan Law Journal. (see p 213 of the judgment).

(See also: *Clear Water Sanctuary Golf Management Bhd v Ketua Pengarah Perhubungan Perusahaan & Anor* [2007] 6 MLJ 446).

[77] Finally, I may also refer to Lord Goddard CJ judgment in *Huddersfield Police Authority v Watson* [1947] KB 842, at p 848 where (in the context of stare decisis) he said:

> … I think the modern practice, and the modern view of the subject, is that a judge of first instance, though he would always follow the decision of another judge of first instance, unless he is convinced the judgment is wrong, would follow it as a matter of judicial comity. He certainly is not bound to follow the decision of a judge of equal jurisdiction.

[78] Thus, the position that I take is that *Nadaraja*'s case (and by extension the subsequent High Court cases that applied the principle that was enunciated in that case) being a decision of a court of coordinate jurisdiction, whilst deserving the respect and deference that is due to it, is not binding on this court.

[79] In this regard, after having pondered over the matter thoroughly, I have decided not to follow *Nadaraja*'s case as I am of the view that it was decided per incuriam. First, in that case, there was no proof at all that there was even a winding up petition against Biografik (M) Sdn Bhd, which led the judge to remark at p 407 of the judgment as follows:

> Lastly, the the defendant was faced with another impediment which he was unable to hurdle. Aside from say so of the the defendant's solicitor, there was no evidence before this Court that there actually was any Winding Up Petition against Biografik (M) Sdn Bhd.

[80] So, it may be said that whatever conclusions that were made by the court in *Nadaraja*'s case were purely obiter as that case did not even concern an issue of transfer of shares of a company in respect of which winding up had been proven as having actually commenced.

[81] Also, it may be observed that the learned judge gave short shrift to the submissions made by the the defendant's solicitor in that case as he produced no authorities in support of his proposition that any transfer of shares in Biografik (M) Sdn Bhd consequent upon the order for sale (which was sought by the the plaintiff/judgment creditor in sequel to a charging order absolute) would lead to an alteration in the status of members and was therefore contrary to s 223 of the CA.

[82] But, as we now know, there are in fact a plethora of cases touching upon the point as regards the effect of s 223 of the CA (or its equivalent provisions in the United Kingdom, Singapore and in Australia) on share transfers after commencement of winding up vis-a-vis company concerned.

[83] The cases such as *Sullivan v Henderson* [1973] 1 All ER 48, *Kong Swee Eng v Rolles Rudolf Jurgen August* [2010] SGHC 300, *Re Onward Building Society* [1891] 2 QB 463, In the matter of *Maertin v Klaus Maertin Pty Ltd* [2009] NSWSC 618, *Carringbush Corporation Pty Ltd v Australian Securities And Investments Commission* [2008] FCA 474 and *Jordanlane Pty Ltd v Kimberley Jane Elizabeth Kitching Andrew* [2008] VSC 426 clearly establish the principle that any transfer of shares after the commencement of winding up is void vis-a-vis the company but valid inter se as between the parties to the underlying transaction, be it a sale of shares agreement or a put option or any other agreement of like effect.

[84] Thus, as between in the parties to the transaction, it may be enforceable but not in so far as the company is concerned. In the context of any agreement which necessitates a share transfer, the implementation of that part of the agreement vis-a-vis the company would be contrary to s 223 of the CA as any such transfer after the commencement of winding up would be void.

[85] The rationale for the rule, as may be culled from the string of cases that had been alluded to during submissions in this case, is that such a transfer is void vis-a-vis the company as otherwise the shares may be transferred to an impecunious party and this would be prejudicial to creditors in the event of a need to make a call on shareholders for any unpaid portion of shares. For example, see the *Jordanlane*'s case at p 4, para 14 where it said:

> Whilst any transfer of shares made after the commencement of a winding up is void unless appropriately sanctioned so far as regards any effect to be given to it by the company, a contract to transfer shares is not rendered void by the section as between the parties themselves. This is because *the purpose of s 468(1) in relation to the transfer of shares is to prevent a shareholder from evading liability as a contributory by transferring shares to some impecunious person after a winding up has commenced and this purpose is sufficiently served by avoiding the transfer only so far as the company is concerned.*

[86] All the cases that were referred to during submissions demonstrate a uniform approach in terms of interpretation and rationale which underpins the statutory provision which is equivalent to s 223 of the CA. It may thus be said that the United Kingdom, Singapore and Australia share a common jurisprudence in relation to the validity of share transfers after commencement of winding up.

[87] Thus, it is only in Malaysia, following *Nadaraja*'s case, that we have hitherto, taken the approach that since the shares that have been or are to be transferred do not belong to the company, the share transfer does not therefore contravene s 223 of the CA.

[88] In this regard, I would say that if the learned judge in *Nadaraja*'s case had been apprised of the relevant statutory provisions and case law from the other jurisdictions, as has been done in the present case before me, then the outcome would or may have been different. Also, it is my view that the words, 'and transfer of shares and alteration of members' must be read disjunctively instead of conjunctively with the other words appearing in the same section. In my view, the most logical interpretation to the phrase 'any disposition of the property of the company' as appearing in s 223 of the CA, is that it encompasses shares which are owned by the company, meaning, assets or property of the company.

[89] To my mind, the words 'any transfer of shares' appearing in s 223 of the CA relates to changes in the ownership of shares in the company. It is separate and distinctly different from assets or property of the company. Hence, 'any transfer of shares' or change in the ownership of shares post commencement of winding up caters for a situation separate from disposition of property of the company and is to be read disjunctively and are accordingly prohibited by s 223 of the CA, unless validated by the court in the exercise of its winding up jurisdiction.

[90] In short, what s 223 of the CA envisages is that after commencement of winding up, there must be a moratorium on shareholding and status of members of the company, unless there is a validation order, by the winding up court, which permits any change to shareholding or status of members. It is obvious enough that all of these have a direct or indirect impact on creditors, but that in and of itself does not in any way support the interpretation adopted by the court in *Nadaraja*'s case, that transfer of shares in the company post commencement of winding up is not caught by s 223 of the CA as these shares do not belong to the company.

[91] Based on the jurisprudence emanating from the different jurisdictions, it is clear that there is a rationale for the prohibition on share transfers post commencement of winding up.

[92] But, all of these were not ventilated in *Nadaraja*'s case and as such, I am convinced that *Nadaraja*'s case to the extent that it enunciates that transfers of shares post commencement of winding up are not caught by s 223 of the CA, was per incuriam.

[93] As I said, there was in fact no evidence before the court that there was even a winding up petition against the company in the case. Hence, all that the learned judge had to do was to dismiss the point *in limine*, without embarking upon an interpretative exercise, which has led to a conclusion which obviates or by-passes the need for a validation order and which runs contrary to established case law in other jurisdictions.

[94] In the circumstances, I am of the view that the impugned share transfers which are stated in encls 33 and 36 are contrary to s 223 of the CA and are accordingly void. Following the judgment of the Court of Appeal in the *Zulpadli*'s case, the transfer of shares which is rendered void is void at the time it took place. (See *McPherson, The Law of Company Liquidation*, (4th Ed) p 222).

[95] As such, the impugned share transfers were void as at 22 November 2012. For the reasons as stated above, I was of the view that the impugned share transfers in as much as they took place after the commencement of winding up, and in the absence of any validation order, were contrary to s 223 of the CA.

[96] For completeness, I should say that a validation order can only be granted by the winding up court and not by this court in the exercise of its original civil jurisdiction. See *Sullivan v Henderson* [1973] 1 All ER 48 (at para g–h p 50 of the judgment). But at the same time I am conscious of the fact that the Court of Appeal in *Bintang-Bintang Sdn Bhd v The Ayer Molek Rubber Company Bhd* [2013] 4 MLJ 401; [2013] 4 CLJ 820 appears to have left open the possibility of a validation order being granted by a court in related legal proceedings (see para C at p 414 (MLJ); p 836 (CLJ) of the judgment).

[97] In this regard, counsel who appeared before me implicitly, if not expressly accepted that an application for a validation order ought properly be taken up in the winding up court. In fact, that was one of the issues raised by counsel for Henry, who complained that the challenge to the validity of the impugned share transfers by way of the O 14A applications in these proceedings was effectively a pre-emptive strike by Madam Tan and Gary and that Henry had been prevented or precluded from seeking a validation order

from the winding up court so as to sanitise the impugned share transfer.

Second issue: whether the stay order in the main suit renders s 223 inoperative

[98] As a separate and distinct argument, it was submitted by counsel for Henry that the effect of stay order on the winding up petitions is that whilst the stay order is still operative, the impugned share transfer is valid. In this regard, counsel for Henry relied upon the decision of the Court of Appeal in *Bintang-Bintang Sdn Bhd v The Ayer Molek Rubber Company Bhd* [2013] 4 MLJ 401; [2013] 4 CLJ 820 (*Ayer Molek*'s case) where the court dealt with a variety of issues, including the issue as to whether the transfer of the land after commencement of winding up where there no validation order and where there was a stay of the winding up was valid. In that case, the relevant stay order that was considered by the court was the stay order dated 17 May 2006.

[99] The sequence of the relevant events in the *Ayer Molek*'s case were as follows:

4 Jan 2006	Winding up petition presented
13 April 2006	Winding up order made
17 May 2006	Stay of the winding up order (until the disposal of the appeal by the Court of Appeal against the winding up order).
27 June 2006	Transfer of land registered in favour of the appellant.
20 Sept 2007	The respondent's appeal to Court of Appeal against the winding up order dismissed. Stay order set aside.
8 Aug 2008	High Court grants a permanent stay of the winding up order.

[100] The issue there was the validity of the transfer of the land which took place after the winding up order which had been stayed by order dated 17 May 2006. In this regard, the Court of Appeal held as follows:

> (1) The transfer of the land was validly done when the 17 May 2006 stay order was still effective. The transfer was registered during the period of the first stay order and therefore, s 223 of the CA was not operative at all.

(see para 20 (f) at p 417 (MLJ); p 839 (CLJ) of the judgment).

[101] During the course of oral submissions before me, there was some confusion among counsel as to whether the 17 May 2006 stay order in the *Ayer Molek*'s case was an order made under s 243 of the CA or one granted pursuant to s 253 of the CA also loosely referred to as a 'common law stay pending appeal'. Counsel for Henry said that whilst a reading of the chronology of events as set out in para (f) at p 417–418 (MLJ); p 839–841(CLJ) of the judgment reveals that the 17 May 2006 stay order was a common law stay, the

Court of Appeal appears to mention in passing at para 9 at p 407 (MLJ); p 827 (CLJ) that the said stay was one granted under s 243 of the CA. After the matter had been reserved for decision, counsel for Henry informed the court via supplemental submissions that they contacted the solicitors involved in the *Ayer Molek*'s case, Messrs PG Lim & Co who confirmed that the stay order of 17 May 2006 was not granted by Justice Vernon Ong, but was granted by Justice Zainun Ali and was a stay granted conditional upon the company depositing in court the judgment sum of RM2,097,615.52 and that the stay granted was pending final disposal of the company's appeal in the Court of Appeal against the winding up order. Apparently, the application for stay was made pursuant to s 73 of the Courts of Judicature Act 1964 and/or the inherent jurisdiction of the court (that is a stay pending appeal). They were also informed that leave to appeal to the Federal Court was denied, and thus, the Court of Appeal in the *Ayer Molek*'s case stands.

[102] Counsel for Madam Tan and Gary took a different view. They said that a stay order granted after winding up proceedings have been commenced does not nullify or discontinue the proceedings. The proceedings still exist but the petitioner cannot proceed further in the matter. As such, in the present, the stay order in the main suit granted on 2 November 2010 did not affect the operation of s 223 of the CA.

[103] As an amplification as to nature and effect of a stay of proceedings, counsel relied on the following passage from *Lina Soo v Ngu Chu Hiong & Anor* [2003] 6 MLJ 641 at p 648, where it was said,

> (i) *It is important at this juncture to take stock of the nature and effect of a stay of proceedings. In Halsbury's Laws of England (4th Ed) Vol 37, para 437 states: 'A stay of proceedings arises under an order of the court which puts a stop or 'stay' on the further conduct of the proceedings in that court at the stage which they have then reached, so that the parties are precluded thereafter from taking any further step in the proceedings'. However, para 438 of Halsbury's states: 'A stay of proceedings is not the equivalent of a judgment or of a discontinuance, and may be removed if proper grounds are shown, even if the stay is imposed by a consent order. In contrast with a judgment for the the defendant or the dismissal or discontinuance of an action, in the case of stay of proceedings, whether conditional or absolute, the action will subsists; is still 'pending', and the stay is therefore always potentially capable of being removed.* (Emphasis added.) The principle is echoed in the statement of law in the Malaysian Court Forms in Civil Proceedings [23007] cited by the learned counsel for the co-respondent.

[104] Counsel for Gary also relied upon on the following passage from *Rofa Sport Management AG v DHL International (UK) LTD* [1989] 1 WLR 902 at p 911 where it was said,

> (i) In my judgment, for the sake of clarity and certainty the word 'stay' in an order should not be treated as a possible equivalent of a dismissal or a discontinuance. There may well, of course, be cases, however, where the person who wishes to have the stay removed will face great difficulties. An action which has been stayed by consent following a compromise provides an obvious example. But, as it seems to me, the action following a stay remains technically in being. The action cannot proceed or resume its active life without an order of the court, but I do not consider that it can properly be regarded as dead in the same way as an action which has been dismissed or discontinued by order.

[105] In so far as the winding up petitions are concerned it was submitted that winding up had commenced on the respective dates when the winding up petitions were presented in 2010. The stay order granted on 2 November 2010 in the main suit does not discontinue or wipe out the winding up proceedings and that as at 22 November 2012, the winding up proceedings were still existing or pending and as such, s 223 of the CA applied in relation to the impugned share transfers. Counsel said that the *Ayer Molek*'s case is not applicable to the present facts as that case pertained to stay orders granted (or was perceived by the Court of Appeal as having been made) pursuant to s 243 of the CA which allows a company to proceed as if no winding up order existed. See paras 9–10 of the case (para F–I) at pp 827 and 828 and para 20 (d) of the case (para A–B) at p 837.

[106] In so far as the stay and its effect is concerned, it was submitted that the winding up petitions in respect of the companies have merely been stayed pending the trial of the main suit, ie the PHC Suit No 22–52 of 2010 and that the proceedings under the winding up petitions remain alive but left temporarily in abeyance or in suspended animation. Accordingly, it was submitted that the case of the *Ayer Molek*'s case is of no assistance to Henry who sought to argue that a validation order was not necessary as there was no contravention of s 223 of the CA.

Conclusions on the second issue (effect of the stay order)

[107] In so far as the second issue is concerned, everything rested on the opinion of Court of Appeal in the *Ayer Molek*'s case which are encapsulated in the following passages of the judgment at p 401 (MLJ); p 839 (CLJ) of the judgment:

A … in the instant case we do not think a validation order is necessary as the transfer of the property was validly done when the first stay dated 17 May 2006 was effective. In fact attempt to sell the property had commenced as early as 5 May 2005. The memorandum of transfer and the transfer was registered during the period of the first stay and in consequence the provision of s 223 will not become operative at all.

B

[108] The question now is whether that opinion by the Court of Appeal in the *Ayer Molek*'s case was predicated on the footing that it was a stay under s 243 of the CA or a common law stay. Bastian Vendargon learned counsel has pointed out that factually the stay order dated 17 May 2006 was a (conditional) C stay pending appeal made under s 73 of the Courts of Judicature Act 1964 and not a stay under s 243 of the CA.

[109] It goes without saying that if that is so, then the decision of the Court of Appeal in the *Ayer Molek*'s case will apply such that s 223 of the CA will be D inoperative in light of the stay order in the main suit. But the problem here is that from my reading of the judgment, the Court of Appeal did not regard the 17 May 2006 stay order as a common law stay. In fact it went the other way and regarded it as a stay under s 243 of the CA. This is crystal clear from the following passages in the judgment where the court said at p 407–408 (MLJ); E p 827 (CLJ) of the judgment, the court said:

> [9] *There were two stay orders pursuant to* s 243 of the CA 1965. *The first stay order was granted on 17 May 2006 pending appeal to the Court of Appeal against the winding-up order*. The appeal was dismissed on 21 September 2007 and in consequence the stay F lapsed. The second stay order was secured with the knowledge of the relevant parties on 8 August 2008.
>
> [10] It must be noted here that the stay order dated 17 May 2006 does not state that the company is prohibited from disposing of the said land until the disposal of the appeal. In fact all relevant parties were aware of the disposal or proposed disposal G which had commenced as early as May 2005. In addition there is no prohibition in law more so under s 223 of the CA 1965 to include such a term *when a stay under* s 243 of the CA 1965 *is made*. In this case that was not done but the solicitors for the respondent attempts to distinguish the stay under s 243 pending appeal as a temporary stay and in consequence argues there cannot be a disposal during that period, but did not furnish any authority on point. We will deal with this issue later H in the judgment.
>
> (Emphasis added.)

[110] Hence, going by the judgment, it is clear that the Court of Appeal had I construed or regarded the stay order dated 17 May 2006 as a stay (pending appeal) but made under s 243 of the CA. But counsel for Henry says that factually the stay order of 17 May 2006 was a common law stay pending appeal under s 73 of the Courts of Judicature Act 1964 or under the inherent jurisdiction of the court. Counsel then invited me to apply the *Ayer Molek*'s case

and hold that the stay order in the main suit in the present case has the same effect as the stay order dated 17 May 2006 that was alluded to by the Court of Appeal in the *Ayer Molek*'s case.

[111] I declined counsel's invitation as stated above as I was of the view that counsel's submission amounts to saying that I should apply the conclusion reached by the Court of Appeal which favours Henry's position that no validation order is necessary but to predicate it on the footing that what the Court of Appeal was actually referring to was a common law stay, notwithstanding that the language of the Court of Appeal suggests that the court was referring to a stay under s 243 of the CA.

[112] If I were to accede to counsel's submissions and read into the judgment of the Court of Appeal in the *Ayer Molek*'s case something which is not expressly stated therein or worse, to read into it a factual premise which is contrary to what was stated in the judgment, then that would be a recipe for chaos as I would be setting a dangerous precedent, apart from also offending the stare decisis rule.

[113] I am of the view that despite counsel's research which had clarified or elicited information to show that the stay order of 17 May 2006 was in fact a common law stay pending appeal made under s 73 of the Courts of Judicature Act 1964 or under the inherent jurisdiction of the court, I cannot by way of collateral proceedings make a finding of what should be the true factual position in another case and to correct or modify the factual basis on which the Court of Appeal had made its decision in the *Ayer Molek*'s case.

[114] On the contrary, it is my view that I have to take the judgment of the Court of Appeal in the *Ayer Molek*'s case as I find it and to apply the principle which is predicated on the factual premise as appears in the judgment.

[115] But it is still open to parties to the present proceedings to ventilate the issue before the Court of Appeal which will hear the appeal from a decision of this court in respect of the O 14A applications and to apprise the Court of Appeal of the factual matters relating to the nature of the stay order dated 17 May 2006, so that the *Ayer Molek*'s case may be revisited, so as to obtain a clear position as to the nature and effect of a common law stay on a winding up and in particular its impact, if any, on matters that would ordinarily have been caught by s 223 of the CA.

[116] I am therefore, left with Hobson's choice in relation to the *Ayer Molek*'s case and since the Court of Appeal had clearly and unequivocally stated in the judgment that a stay under s 243 of the CA obviates the need for a validation

order under s 223 of the CA, and since the stay order in the main suit is not a stay under s 243 of the CA, it means that the *Ayer Molek*'s case cannot apply to the facts of the present case.

[117] In the result, and for the reasons as stated above, a validation order under s 223 of the CA is in my view, necessary in order to validate the impugned share transfers. As there is no validation order, the impugned share transfers are therefore void.

THE ORDERS

[118] I therefore allowed the applications made under O 14A of the ROC 2012 (encls 33 and 36). I also ordered the the plaintiffs in Suit No 83 to pay costs of RM10,000 to the first defendant (Gary Tan) and RM10,000 to the second defendant (Madam Tan). The matter was then fixed for case management on 29 October 2013 at 11am for further directions in respect of Suit No 80 and Suit No 83 and for counsel to inform the court as to how parties intended to proceed in view of the applications in encls 33 and 36 which I had allowed.

Order accordingly.

Applications allowed.

Reported by Ashok Kumar